No. 47832-3-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

KAIN KLAUDE KIRKENDOLL,

Appellant,

v.

KRISTIN ALENE PETERSON (f.k.a. KIRKENDOLL),

Respondent.

BRIEF OF RESPONDENT

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A. INTRODUCTION

Trial courts are afforded a great deal of discretion in family law matters. When they comply with their statutory duties and their decisions are supported by substantial evidence, this Court will not re-try the matter to achieve a result that the appealing party prefers.

Kain Kirkendoll has filed a 50-page brief challenging decisions by the trial court that are supported by clear laws and substantial evidence. His arguments are based upon misrepresentations of the record and of case law, and are not reasonably grounded in fact or law. His appeal is nothing more than a continuation of his obstructive and deceptive tactics below, for which he was found in contempt at the trial court. His frivolous arguments should be rejected, and Peterson should be awarded fees for having to defend against his appeal.

B. STATEMENT OF THE CASE

Kain Kirkendoll and Kristin Peterson were married for 27 years. CP 15. Starting in 1989, Peterson worked in the manufactured housing industry, including working for Washington Home Center, Inc. ("WHCI"). RP 37, 81. In the late 1980's and early 1990's Kirkendoll was a salesman at Les Schwab. RP 82. Peterson eventually got him a job at WHCI. RP 82. Peterson's experience in the business was superior to Kirkendoll's. RP 86. In the mid-1990's, Peterson was seriously injured and spent a year

in a wheelchair. She did not stop working, however, she worked from her convalescent bed and continued to earn her keep from WHCI. RP 164.

Peterson and Kirkendoll purchased WHCI in 2007. CP 43. They paid $1.2 million dollars for the business financed through loans using inventory as equity. *Id.* When the housing downturn happened, and WHCI was struggling, Peterson took a job at an athletic club so that her family could continue to have health insurance. RP 165. After Kirkendoll filed for dissolution, that job became her only source of income. RP 164.

In June of 2014, after 27 years of marriage, Kirkendoll petitioned for dissolution. CP 5. During the course of the proceedings, Kirkendoll engaged in a number of questionable tactics. Kirkendoll changed all the accounts to his name and blocked her access. RP 106-07. He was found in contempt of court for failing to comply with orders to restore her name to the accounts and failing to provide her with meaningful financial information for their business. RP 108-09. When her car broke down and she requested to use a community property truck that was sitting idle, Kirkendoll refused, even though he admitted her request was "reasonable." RP 111, 117. The trial court eventually ordered Kirkendoll to give her use of the truck during the proceedings. RP 113.

Kirkendoll hired an expert to value the business for use in the dissolution. He paid for the expert out of company funds, not his personal

funds. RP 89. Despite Peterson's superior experience in the business, Kirkendoll did not tell his expert about Peterson's expertise, and did she not interview Peterson before reaching her conclusions. RP 37.

In his financial declaration, Kirkendoll insisted that all he took from the business was $6,500 in salary. Ex. 5; RP 86. But his 2014 personal tax return showed that he took almost $150,000 in salary and business profits. Ex. 19. The trial court noted his deception regarding the fact that his financial declaration failed to disclose significant monetary benefits he received from the business over and above his salary. Appendix A; CP ___.[1] For example, he claimed on his declaration that he had monthly personal transportation expenses of $675.00. Ex. 5. However, it was later revealed that all of those expenses were paid by the business. RP 123-25. Kirkendoll also failed to disclose that he used the business to reimburse himself for expenses associated with the dissolution, including hiring his expert witnesses. RP 119.

At trial, the two most significant issues were the valuation of the business and the parenting plan. Regarding the valuation of the business, Kirkendoll submitted his expert opinion (which he paid for with funds from the business that was, at that time, community owned). *Id.* His

[1] Peterson has filed a supplemental designation of clerks' papers forwarding this document to this Court.

expert valued the business at $100,000, and said that value was "solely goodwill. RP 29. However, on cross examination, she testified that the business profits had increased 110% in one year, and that the housing recovery meant that the business going forward would likely have a goodwill value of closer to $200,000. RP 47. Her valuation almost doubled on cross-examination because she was provided with the 2014 financial information Kirkendoll had neglected to provide. *Id.*

Regarding the parenting plan, there was no dispute about with whom their 14-year-old child would reside; both agreed she should reside with Peterson. RP 7. The issue at trial was developing a visitation schedule with Kirkendoll. The trial court listened to the evidence from both parents and, pursuant to RCW 26.09.187, elected to speak to the child in camera about her preferences. The court explained she was mature enough to express her opinions about how alternative options for the parenting plan would impact her, both positively and negatively. RP 236-39. In camera, the fourteen-year-old child proved to be articulate and specific about her preferences, and why flexibility in her visitation was important to her. RP 244-58. As the judge made suggestions regarding the plan, she continually emphasized that the child … not enjoy time with him when it was ordered, or her words "forced." *Id.* When the trial court suggested a plan with some mandatory visitation, and also unlimited

flexible visitation as she and her father could arrange together, the child responded very positively:

> Q: But other than that, you can still see your dad every other Sunday from St. Christopher's until 6:00 o'clock or something like that?
>
> A. Yeah. And if I wanted to go see my dad, my mom wouldn't care, so that would be okay.
>
> Q. So you could commit to that, but also agree to see him at other times?
>
> A. Yeah.
>
> Q. When the two of you agree, you and your dad could figure that out?
>
> A. I do enjoy going to visit my dad, but I don't enjoy it when I feel forced that I have to go see him. So it would be enjoyable for me to go when I feel like I want to go visit my dad and hang out with my dad.

RP 258. Kaya also participates in numerous extracurricular activities, and has a demanding schedule. CP 167, 246-47.

Having heard from both parents and child, and having weighed her preferences as "just a factor" in the decision (RP 263-64) the trial court set a schedule with some mandatory time with the father, but with unlimited additional time by agreement of father and daughter together. CP 154-55. The trial court, in explaining her position the parents, noted the difficulty of balancing the needs of the parents, who want to be with their child, with

the mature child's need to be able to make some of her own choices, and not to feel forced and deprived of control:

> She talked about -- what we talked about this summer, maybe should it look different this summer, and I threw out the possibility of maybe spending a couple weeks with her dad, and she was not comfortable with that at all. Again, she doesn't want to feel she has to be with you right now. This is a difficult time for parents in the middle of separation and divorce, but also with a young person who is becoming more independent and who needs to be able to make her own choices. There's a balance there, and there's still a role for a parent, but part of the role for the parent is to allow your young person to make choices and to help them make better choices.

RP 262.

Finding that the goodwill value of the business was $200,000, the trial court divided the marital assets and debts between the parties in a way that gave Kirkendoll significantly more assets. RP 178, 191. Kirkendoll was given sole ownership of the business that Peterson had worked at for more than two decades. The trial court found that Kirkendoll's income was $12,439.00, and Peterson's income was $3,866.00. CP 171. Kirkendoll was ordered to pay Peterson $3,000 per month maintenance and a little over $1,100 per month in child support. The trial court made explicit findings regarding Peterson's need for maintenance and Kirkendoll's ability to pay. CP 183.

Regarding the parenting plan, the trial court ordered the child to spend every other Sunday with her father, and ordered as much additional visitation/residential time with Kirkendoll as father and daughter agreed to together. CP 154.

Kirkendoll appealed. CP 70. He made numerous attempts to stay all or part of the trial court's decision. Appendix B-D. Each time he filed his repeated motions for stay, he would alter the facts or relief requested. He filed a motion with this Court to stay all of the trial court's orders without posting a supersedeas bond. Appendix B. His motion was denied. *Id.* Instead of moving to modify, he filed a new motion to stay only the award of maintenance and the distribution of the most significant asset Peterson was awarded, an Edward Jones retirement account. Appendix C. His motion was denied because he had not complied with the appellate rules by moving first in the trial court to weigh whether or not it was appropriate to supersede periodic payments. *Id.* He made the motion in the trial court, and it was denied. Appendix D. He moved this court to overturn the trial court's ruling, but this Court did so only in part, denying his request to avoid paying maintenance, but granting him the right to supersede the judgment awarding the retirement account to Peterson. *Id.*

C. ARGUMENT

(1) Standard of Review

"We once again repeat the rule that trial court decision in a dissolution action will seldom be changed on appeal. Such decisions are difficult at best. Appellate courts should not encourage appeals by tinkering with them. ... The spouse who challenges such decision bears the heavy burden of showing a manifest abuse of discretion by the trial court. The trial court's conclusion will be affirmed unless no reasonable judge would have reached the same conclusion." *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985).

This Court reviews the trial court's findings of fact and conclusions of law to determine whether substantial evidence in the record supports the findings and, if so, whether the findings support the trial court's conclusions. *In re Marriage of Fahey,* 164 Wn. App. 42, 55–56, 262 P.3d 128 (2011). If substantial evidence supports the trial court's findings of fact, they will not be disturbed on appeal. *In re Dependency of J.A.F.*, 168 Wn. App. 653, 667, 278 P.3d 673 (2012).

"Substantial evidence exists if the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Fahey,* 164 Wn. App. at 55. "Even where the evidence conflicts, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged

findings." *State v. Black,* 100 Wn.2d 793, 802, 676 P.2d 963 (1984). This Court defers to the trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony. *In re Knight,* 178 Wn. App. 929, 937, 317 P.3d 1068 (2014).

(a) The Trial Court Did Not Manifestly Abuse Its Discretion By Allowing Some Mandatory Residential Time Supplemented with as Much Additional Time as the Father and Child Would Like

Decisions regarding residential placement must be made in the best interests of the children after considering the factors set forth in RCW 26.09.187(3). *In re Parentage of J.H.,* 112 Wn. App. 486, 492–93, 49 P.3d 154 (2002). In Washington, "the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002.

This Court reviews a trial court's decisions on the provisions of a parenting plan for an abuse of discretion. *In re Custody of Halls,* 126 Wn. App. 599, 606, 109 P.3d 15 (2005). A trial court abuses its discretion if the decision rests on unreasonable or untenable grounds. *Id.* at 606; *In re Parentage of Schroeder,* 106 Wn. App. 343, 349, 22 P.3d 1280 (2001).

While courts also should encourage the involvement of both parents, "this is a *secondary goal* and courts should never sacrifice the best interests of the child to allow both parents to be involved." *Id.* at 349

(emphasis added), *citing In re Marriage of Littlefield,* 133 Wn. 2d 39, 52–53, 940 P.2d 1362 (1997).

Because the trial court hears evidence firsthand and has a unique opportunity to observe the witnesses, the appellate court should be "extremely reluctant to disturb child placement dispositions." *Id., quoting In re Marriage of Schneider,* 82 Wn. App. 471, 476, 918 P.2d 543 (1996), *overruled on other grounds by Littlefield,* 133 Wn.2d at 50.

The trial court here was tasked with fixing a residential schedule that allows both parents "contact" with the child, and permits each to maintain "a loving, stable, and nurturing relationship" with her. *Schneider,* 82 Wn. App. at 475. Particularly, the parenting plan must take into account the following factors:

> (i) the relative strength, nature, and stability of the child's relationship with each parent;
>
> (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
>
> (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
>
> (iv) The emotional needs and developmental level of the child;

(v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;

(vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and

(vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

RCW 26.09.187(3). The first factor, the strength, nature, and stability of the parent-child relationship, is given the greatest weight. *Id.* The trial court considered all of these factors in making the decision regarding the residential schedule. RP 263.

There is no mandatory minimum amount of contact that the trial court must order, in fact, the statute's language regarding alternating contact is permissive: If there are no limiting factors such as sexual or emotional abuse, the trial court "*may* order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child." RCW 26.09.187 (emphasis added).

Kirkendoll's challenge to the parenting plan stems from a false premise: that the trial court's parenting plan contains "limitations or restrictions" on his time with his daughter. Br. of Appellant at 17. On the

contrary, under the plan, his time with her is unrestricted, based on the mutual agreement of father and daughter. Neither the order nor Peterson has any power to restrict or limit Kirkendoll's voluntary additional time with the child, save for the usual Mother's Day holiday to be spent with Peterson. CP 154-55.

Kirkendoll establishes his false premise by suggesting that legally, the trial court was required to order what he calls "normal visitation," and that any other schedule constitutes a "restriction." Br. of Appellant at 18. He cites RCW 26.09.191 and *In re Marriage of Watson*, 132 Wn. App. 222, 130 P.3d 915 (2006) in support of this proposition.

There is no support in the statute or in *Watson* for Kirkendoll's claim that a parenting plan not conforming to what he calls "normal visitation" constitutes a "restriction or limitation," and therefore must be justified under RCW 26.09.191. That statute governs situations where the trial court *must* order restrictions and limitations in a parenting plan, the trial court found it did not apply here. CP 153-54. *Watson* did not involve the establishment of a new parenting plan, but the proposed *modification* of an existing parenting plan. *Watson,* 132 Wn. App. at 225. The existing plan granted the father alternating weekends, Thursday evenings and holidays and summers. *Id.* The mother sought modification based on allegations of sexual abuse. *Id.* at 227. The trial court concluded the

allegations were unproven, but then entered contradictory findings that the petition was denied, but that the original plan was temporarily modified. *Id.* at 228. The modification limited the original parenting plan significantly, and included a restriction that the father's time would have to be supervised. *Id.* This Court concluded that the trial court had abused its discretion in altering the original parenting plan without having actually found that the evidence and statutory authority existed to support it. *Id.* at 233, 235.

Contrary to what Kirkendoll suggests, *Watson* does not command that a trial court must order "standard visitation rights" unless statutory factors prohibit it. *Watson* does not establish any fixed residential or visitation schedule as a matter of law. An appeal about a trial court's statutory authority to modify a parenting plan has nothing to do with this case.

Kirkendoll also cites *Katare v. Katare,* 125 Wn. App. 813, 816, 105 P.3d 44 (2004) for the proposition that the trial court abused its discretion here. Br. of Appellant at 18. *Katare* involved specific parenting plan restrictions on a father "designed to prevent him from taking his children out of the country, and limiting his visits to a two-county area in Florida...." *Katare,* 125 Wn. App. at 816. This Court concluded that the trial court's findings were ambiguous and

contradictory, and remanded for clarification about the justification for the restriction on travel to India. *Id.* at 831. This Court also concluded that the father should be able to bring the children to Disney World, and modified the order accordingly. *Id.* at 832.

This case is nothing like *Katare.* There are no limitations or restrictions in the parenting plan, both parents share standard abilities to make parenting decisions, travel, etc. with the child. CP 154-55. The 14-year-old child is *required* to spend some time with Kirkendoll by court order, and they may spend unlimited *additional* time together by mutual agreement.

Kirkendoll argues that the trial court abused its discretion in failing to order more mandatory visitation with him. Br. of Appellant at 20. He cites as "instructive" *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003), *as corrected* (Oct. 27, 2003).

Rideout involved a contempt proceeding in which the father proved that the mother was interfering with residential time with their two young children under a court-ordered parenting plan. *Rideout,* 150 Wn. 2d at 341. The trial court found, based on substantial evidence, that the mother had refused to make the children available and otherwise denied the father access under the parenting plan. *Id.* at 347. Our Supreme Court concluded that the mother acted in bad faith and upheld the contempt

order, despite her claims that the children "resisted" residential time. *Id.* at 355-56. The Court reasoned that because there was evidence the mother "contributed" to the child's resistance, and "failed to make reasonable efforts to require" the child to visit, she had "side-stepped her responsibilities as a parent." *Id.* at 356.

Kirkendoll erroneously imposes the parental responsibilities outlined in *Rideout* on the trial court, suggesting that the trial court was required to "overcome the child's resistance" to visiting with him. Br. of Appellant at 21. He suggests that the trial court should not have ordered unlimited voluntary visitation between father and daughter, but instead should have required more mandatory visitation. *Id.*

Kirkendoll not only misconstrues *Rideout,* which has nothing to do with the responsibilities of a trial court in establishing a parenting plan, but he misstates the record as well. The child did *not* express resistance to seeing her father, she only expressed dismay at being "forced" to do so, and said that she enjoys seeing her father when it is voluntary:

> I do enjoy going to visit my dad, but I don't enjoy it when I feel forced that I have to go see him. So it would be enjoyable for me to go when I feel like I want to go visit my dad and hang out with my dad.

RP 258. Far from "encouraging" this fictional "resistance" to seeing her father, the trial court's parenting plan encourages the child's *desire* to

spend time with her father by respecting her preference that, for the most part, she can communicate with him and come to voluntary agreements about when and where to spend time together.

There is substantial evidence to support the trial court's considered conclusion that the parent-child relationship would be most positive and nurturing if most of their time spent together was by mutual agreement, rather than by court order. The child specifically testified that she enjoyed visiting her father when she did not feel "forced." RP 258. She also stated that her mother would not interfere with her decisions to see her father. *Id.* She also stated that it was difficult for her to get her homework done when she was at her father's house, because he made her "upset" and "nervous" during that process. RP 250. There is also substantial evidence that this mature child, who has a very busy schedule and would struggle with constant shifting between homes, would not have her best interests served by a mandatory visitation schedule. CP 113; RP 245-47.

What Kirkendoll is really asking this Court to do is re-weigh evidence and invent a "standard" mandatory visitation plan that exists nowhere in law. His argument is that this Court should presume, contrary to substantial evidence, that the child will refuse to see him at any time except the court-ordered time, and pronounce the parenting plan as a

"restriction" on his visitation because it does not conform to a specific visitation regime.

It is error for reviewing courts to re-weigh the evidence or pronounce as persuasive that which the trial court did not find persuasive. *Quinn v. Cherry Lane Auto Plaza, Inc.,* 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied,* 168 Wn.2d 1041, 233 P.3d 888 (2010).

Simply put, no statute or case states that the type of flexible parenting plan established here, based on the statutory factors applied to the circumstances of this case, is an abuse of discretion. Kirkendoll's argument regarding the parenting plan is frivolous.

(2) The Trial Court Did Not Abuse Its Discretion in Dividing the Property Equitably With an Advantage to Kirkendoll; Kirkendoll's Challenges Are Based on Misrepresentations of the Record

Kirkendoll raises a number of arguments regarding the trial court's property distribution, which awarded Kirkendoll $371,499.71[2] worth of assets, including the most valuable asset, the business. CP 191. His arguments are all based on misrepresentations of the record and the trial court's findings, and this Court should reject them as frivolous.

[2] Exhibit 22, which the trial court adopted with respect to the division of assets, valued the business anywhere from $100,000 to $1.2 million. CP 191. Thus, the exhibit's asset totals show a range of values between $271,499.71 to $1,371.499.71, depending on the court's view of actual value of the business. The trial court's findings and conclusions valued the business at $200,000. CP 178. Thus, this $371,499.71 is reached by adding $100,000 to the lowest end of the range, to account for the trial court's actual finding regarding the value of the business.

(a) The Trial Court's Finding Regarding the Goodwill Value of the Business Distributed Solely to Kirkendoll Was Adopted Expressly From His Expert's Opinion

Although the parties built equally and owned as a community a successful manufactured home business, the trial court awarded the entire business to Kirkendoll. CP 178. The trial court adopted a valuation of the business of $200,000, based on the expert testimony submitted by Kirkendoll. CP 178. The business value assigned was solely "goodwill." RP 29. "Goodwill" is commonly defined as the expectation of continued public patronage. *Washburn v. Washburn*, 101 Wn.2d 168, 186, 677 P.2d 152, 162 (1984). Goodwill is an intangible value, and is "by nature an asset with an elusive value." *Id.*

Kirkendoll objects to the trial court's valuation on several grounds. First, he denies that the trial court valued the business at $200,000 based on his own expert's testimony, CP 178, and claims that the trial court adopted a "valuation range of $100,000 to $1.2 million" based on Exhibit 22. Br. of Appellant at 31-34. Second, he claims that the trial court "failed to state the factors or method it used" to value the business. *Id.* at 33-34. Third, he claims that the trial court valued the business based on "inexpert testimony," citing *In re Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984). *Id.*

All of Kirkendoll's complaints about the business valuation are based misrepresentations of the record. Kirkendoll relies on a vague oral statement by the trial court in which it stated that it "essentially took care" of the valuations by adopting Exhibit 22. Br. of Appellant at 28. However, the trial court made specific written findings about the value of the business, based on Kirkendoll's expert's opinion, that the business was worth $200,000. CP 178. Kirkendoll's expert did in fact testify that more recent data, reflecting the upturn in the housing market, would support a "significantly higher" valuation than $100,000, "not quite double, but certainly much higher." RP 47. These statements are the ones upon which the trial court's written findings rested.

The trial court did not, as Kirkendoll avers, adopt the valuation "range" of $100,000 to $1.2 million listed in exhibit 22. The order states that the trial court adopted Exhibit 22 "with respect to the division of property and liabilities," not with respect to all its valuations. CP 179. The trial court made separate, specific findings with regard to the valuation of the business. CP 178.

Even assuming the trial court had suggested orally that it was adopting Exhibit 22's valuation of the business, it is irrelevant. A vague oral statement during colloquy does not override express written findings in an order. *Grundy v. Brack Family Trust*, 151 Wn. App. 557, 571, 213

P.3d 619 (2009); *State v. Bryant,* 78 Wn. App. 805, 812–13, 901 P.2d 1046 (1995). The written findings contradict the claim that the trial court merely adopted Exhibit 22's valuation of the business. CP 178.

Also, contrary to Kirkendoll's assertion, the trial court *expressly relied* upon Kirkendoll's expert in reaching a valuation of the goodwill of the business, and state the method used *in detail.* CP 178. The Court recited the expert's testimony, including her statements that she originally valued the business based solely on information provided to her by Kirkendoll. *Id. D*espite Peterson's "extensive experience in the business and in the industry," no information was sought from Peterson by the expert. *Id.* Also, the trial court noted the expert's testimony regarding the significant upturn in the housing market that meant the value of the business going forward was higher than her initial estimate. *Id.* The trial court noted that the expert concluded more recent figures supported a valuation of close to $200,000. *Id.*

Even if the trial court had adopted Kirkendoll's $100,000 valuation, he still would have received more in asset distribution than Peterson. CP 191.

Kirkendoll does not deny these findings are supported by the substantial evidence offered by his expert, which is located at RP 11-79. Instead, Kirkendoll simply denies the reality of the trial court's findings,

claiming that the trial court relied solely on Exhibit 22 to value the business. His claim is inconsistent with the plain language of the order, and is frivolous.

Finally, Kirkendoll has not demonstrated that no substantial evidence supports the trial court's finding valuing the business at $200,000. Nor has he demonstrated that the trial court abused its discretion or failed to state its rationale for valuing the business. Nor has he explained how, after a 27-year marriage, dividing assets almost equally with a slight edge in his favor constitutes an abuse of discretion. His argument is frivolous.

(b) The Trial Court Did Not Award the Same Asset Twice in Allowing Kirkendoll to Retain the Cash He Withdrew from the Business

Kirkendoll withdrew over $72,000 from the business during the pendency of the dissolution. CP 191. The trial court awarded this money to him in the property division, rather than clawing it back and dividing it between the parties. *Id.*

Kirkendoll complains that the trial court should not have considered this cash in calculating its asset distribution because (1) it was not "disposable income," but was instead used to pay personal and business obligations, and (2) the "taxable profit was included in the valuation of WHCI," and thus he claims it was "awarded" twice. In a

related argument in a later section, he argues the trial court should have assumed he has the same "earning capacity" as Kirkendoll, despite his ownership of WHCI, and that it does not represent "as significant potential income stream" for him. Br. of Appellant at 49-50.

Similar to his claims about the trial court's order valuing the business, Kirkendoll denies the facts regarding the $72,000 he withdrew. First, the money was not included in the $200,000 business valuation, which Kirkendoll's expert expressly stated was not based on cash or assets, but was solely the value of the goodwill:

> Q. ...Your current valuation of Washington Home Center is what?
>
> A. Our valuation is $100,000.[3]
>
> Q. Of that amount, how much is goodwill?
>
> A. *All of it is deemed goodwill*, given that the equity balance is a deficit.

RP 29 (emphasis added). The value of "goodwill" is separate from a business's tangible assets, it is based on "intangible factors" such as the expectation of continued public patronage. RP 31. At trial Kirkendoll's expert stated that WHCI had negative assets and its "valuation" was not based WHCI's possession of those funds, but on the goodwill of the

[3] On cross examination, Kirkendoll's expert increased this valuation "substantially" to $200,000. RP 47.

business. RP 29-31. Thus, the two items are separate, and were not awarded "twice."

Second, Kirkendoll's claim that the $72,000 he withdrew is "fictional" because he spent the funds on various expenses, including the business, is unsupported by law or fact. The trial court disbelieved this claim, and substantial evidence supported that finding. It was revealed at trial that despite filing a financial declaration proclaiming that all he received from the business was his $6500 per month salary, Kirkendoll was receiving much more than that, including cell phone expenses, insurance premiums, and thousands of dollars in transportation, meals, entertainment, and the like. RP 125-26. He even used funds from the business to pay fees to his expert used at his personal dissolution trial. CP 36-37. He also complains that he used part of the extracted funds to pay for the mortgage on the family home, but neglects to note that like the business, he was awarded that home, and the equity acquired from the mortgage payments, as his separate property. CP 179.

Kirkendoll cites no legal support for the notion that cash taken and spent by one spouse to improve that spouse's own financial situation is not properly part of the property division because it is not "disposable income." Substantial evidence supported the trial court's determination that Kirkendoll withdrew $72,813 from WHCI, and no authority

Kirkendoll cites suggests that including those funds in the property distribution at trial was an abuse of discretion.

(c) Maintenance Is Separate From Asset Distribution, Kirkendoll's Attempt to Combine Them to Re-Write the "Property Award" Is Meritless, Particularly Because His Calculations Deceptively Omit His Future Income from the Business

Kirkendoll argues that the award of maintenance to Peterson "results in a patent disparity in the economic circumstances of the parties." Br. of Appellant at 37. He claims that the trial court's order creates an imbalance of asset distribution, and tries to demonstrate this by adding the total maintenance awarded to Peterson's asset column, and subtracts it from his own. *Id.* He then cites the statutory factors of RCW 26.09.080 regarding property distribution and complains that the trial court's award, if you add the maintenance to the "asset distribution" list, is not balanced. *Id.* at 38-41.

Peterson cites no authority for the novel proposition that in a dissolution action, maintenance should be treated as part of property being distributed, instead of a separate category of award. This is likely because there is no such authority; the statutes and cases treat maintenance and asset distribution as two completely separate categories courts must consider in a decree. *Thompson v. Thompson,* 82 Wn.2d 352, 356, 510 P.2d 827 (1973) (maintenance can be modified in a subsequent

proceeding, property distribution cannot); *In re Marriage of Coyle,* 61 Wn. App. 653, 660, 811 P.2d 244, 248 (1991) (same). The factors for establishing a property division are separate from the factors supporting an award of maintenance, both textually and literally in the structure of the statute. Compare RCW 26.09.080 ("Disposition of property and liabilities – Factors") and RCW 26.09.090 ("Maintenance orders for either spouse or either domestic partner—Factors").

Maintenance is "a flexible tool by which the parties' standard of living may be equalized for an appropriate period of time." *In re Marriage of Washburn,* 101 Wn.2d 168, 179, 677 P.2d 152 (1984). "The only limitation on amount and duration of maintenance under RCW 26.09.090 is that, in light of the relevant factors, the award must be just." *In re Marriage of Bulicek,* 59 Wn. App. 630, 633, 800 P.2d 394 (1990). Those factors include, but are not limited to: (1) the financial resources of the party seeking maintenance; (2) the time needed to acquire education necessary to obtain employment; (3) the standard of living during the marriage; (4) the duration of the marriage; (5) the age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; (6) and the ability of the spouse from whom maintenance is sought to meet his or her needs and obligations while providing the other spouse with maintenance. RCW 26.09.090.

Kirkendoll claims that the trial court did not consider these factors, but he is wrong. The court specifically addressed the statutory factors in RCW 26.09.090. CP 183. The amount of property each party is awarded is not even a factor listed in the maintenance statute.[4] And although the court should take into account whether the assets awarded equalize the parties' positions, as the trial court pointed out, the potential future profits of WHCI, solely awarded to Kirkendoll, rendered the parties' economic circumstances decidedly unequal. CP 178.

Kirkendoll's "unequal distribution" complaint also overlooks one critical fact: he did not include his *future income from WHCI* in his "property distribution" chart, but did include the future maintenance he would pay from those funds to Peterson, making it falsely appear as if he would be at a financial deficit. Br. of Appellant at 37. His "chart" disingenuously ignores the money he will reap from WHCI over the next 10 years, in order to make the parties' positions appear disparate.[5] *Id.*

Thus, even assuming *arguendo* the trial court's property division should have considered Peterson's future income in the form of a

---

[4] It is certainly not an abuse of discretion to consider the property division when awarding maintenance, but it is not reversible error to rely on the other factors in RCW 26.09.090 and view the parties' situation as a whole. *Matter of Marriage of Crosetto*, 82 Wn. App. 545, 559, 918 P.2d 954, 961 (1996).

[5] Again, Kirkendoll tries to obfuscate that the trial court valued the business at $200,000, using the $100,000 figure.

maintenance award, then it also should have included Kirkendoll's future income from the business. In light of this fact, to make Peterson's "revised" asset distribution chart genuine, he would have to include his projected income stream from the business over the same 10-year period covering the maintenance award. Assuming *only* what he reported on his 2014 tax return – $149,273 – multiplying that figure by ten equals $1,492,730.00.[6] Subtracting the maintenance he will pay Peterson over that same period – $360,000[7] ($3,000 x 12 x 10), that still adds $1,132,730 to his side of the ledger, correcting his "asset distribution" chart[8] as follows:

Property	Kirkendoll	Peterson
Retirement Accounts	$0	$250,763
WHCI Value (goodwill)	$100,000	$0
Future Income from WHCI (not including maintenance payments)	$1,132,730	$0
Cash Taken from WHCI in 2014	$72,813	$0
All Other Assets	$121,153	$23,341
Debt	($22,284)	($30,161)

[6] This is assuming that the business income does not increase, which the trial court found based on substantial evidence that it likely would. CP 16.

[7] The maintenance award lasts slightly longer than 10 years, but for simplicity's sake the extra two months are excluded from these calculations.

[8] This chart assuming *arguendo* Kirkendoll's other asset distribution representations are accurate, for example ignoring the fact that the trial court found the goodwill of the business to be worth $200,000. Peterson is not conceding Kirkendoll's chart entries from his brief are correct. This is only to point out that even assuming his numbers are true, his claim that the trial court's award was imbalanced in Peterson's favor still fails spectacularly.

Maintenance (paid out of future income from WHCI)	$0	$360,000
Subtotal	$1,404,412	$603,943

What is good for the goose is good for the gander. Even using Kirkendoll's dubious "maintenance as property distribution" calculus, he still receives more than twice what Peterson will. Kirkendoll cannot hoodwink this Court by pretending he will have no future income from his solely-owned business, which increased its profits 110% in one year, and create a fictional "property distribution" crediting only the future maintenance Peterson will receive. His argument is frivolous.

Having put aside Kirkendoll's argument that future maintenance should be considered the same as "property distribution" but not his future income, Peterson's argument regarding the distribution is also revealed as frivolous. Peterson concedes that "an equal award of property to both parties would result in an award of nearly $250,000 to each. Br. of Appellant at 38. This is almost exactly what the trial court awarded, except that it gave more to Kirkendoll, the appellant here. CP 178, 191. This admission demonstrates that his argument on this issue is without merit.

(3) Substantial Evidence Supports the Trial Court's Finding Regarding Kirkendoll's Income and the Award of Maintenance Based on Need and Ability to Pay

Kirkendoll avers that the trial court abused its discretion in awarding maintenance. Br. of Appellant at 41-48. He claims that the trial court should have only considered his income after he pays various taxes and business debts, and not the income as he reported it on his 2014 tax return. *Id.* at 42.

Because all of Kirkendoll's arguments regarding maintenance are predicated on his claims that the trial court's findings regarding his income are wrong, then if the trial court's findings are based on substantial evidence, his maintenance arguments fail.

The trial court found that Kirkendoll's monthly income, before taxes and maintenance is deducted, was $12,440.00, and Peterson's was $3,866.00. CP 16, 171. More importantly, the trial court also found that the $12,440.00 figure was likely to increase, given Kirkendoll's expert's opinion about the rebound of the housing industry. CP 16. The trial court based the income findings on Kirkendoll's 2014 tax return, which showed an annual gross income of $149,293.00. Ex. 19. He concedes this figure is accurate. Br. of Appellant at 42. The trial court found his net income, before paying maintenance, was $9,904.88. CP 171.[9]

[9] This figure is taken from the child support worksheets, and is reached by adding $3,000.00 to Kirkendoll's net income from line 3 of the worksheet, which is his pre-maintenance net income.

Although Kirkendoll has conceded that the trial court's finding of a $12,440.00 gross monthly income, and $9,904.88 of a net monthly income, is supported by substantial evidence, he contends the trial court abused its discretion because it did not take into account only his net income *after* he pays debts, particularly a business debt in the form of a note. Br. of Appellant at 42.

The trial court was not obligated to accept Kirkendoll's representations that payments on the note, in the past or in the future, come out of the profits he has taken, or will limit his ability to pay maintenance. In her valuation, Kirkendoll's expert listed the note as a liability of the business, not Kirkendoll personally. Ex. 9 at 10. Also, although his expert declined to include the note payments in calculating Kirkendoll's projected income from the business, she admitted that her income prediction was an "approximation," and that she was completely dependent upon Kirkendoll's representations in reaching her conclusions. RP 23, 36.

Trial courts are not required to credit every representation a litigant makes, particularly when that litigant has deceived the court in the past. *Riblet v. Spokane-Portland Cement Co.*, 45 Wn.2d 346, 349, 274 P.2d 574 (1954) ("It was within [the trial court's] province to pass upon the credibility of Hubbell's uncontradicted testimony, and he was entitled to

disbelieve it, particularly that part based upon opinion where there were facts and circumstances tending to discredit it."). Kirkendoll misrepresented his income in his first declaration submitted to the court. Ex. 5. His declaration was contradicted by his tax return. Ex. 19. The trial court found, in an order from which Kirkendoll has not appealed, that he deceived the court about his finances. Appendix A; CP ____. He also took lucrative financial advantages from the business that were not reflected in his declaration, paying a number of his bills, including medical insurance, plus taking reimbursements for automobile expenses, including mileage. *Id.*

In addition to continuing his deceptive representations from below, Kirkendoll ignores other factors contributing to the trial court's maintenance ruling. Although payments on the note may decrease the profit margin Kirkendoll actually puts in his pocket, the trial court found that the business would increase in profits over time, which would cover this expense. CP 178. Kirkendoll also ignores that the payments on the note are not infinite. By his own admission, the note balance is $130,000, and thus will be paid in full three years from the date of the decree. RP 90.

Kirkendoll does cite *In re Marriage of Mull,* 61 Wn. App. 715, 722, 812 P.2d 125 (1991), likening payments on the note to "capital

contributions" to the business, which he claims should not be included in his net income. Br. of Appellant at 48. However, *Mull* involved a child support calculation challenge, not a maintenance challenge. Child support income and deduction calculations are based on a mandatory formula. RCW 26.19.071. The trial court was not obligated to follow mandatory child support schedule deductions to determine the amount of maintenance. The factors governing child support and maintenance are separate and governed by statute, and thus *Mull* is inapposite.

Kirkendoll also cites the inapposite *In re Marriage of Mathews*, 70 Wn. App. 116, 123, 853 P.2d 462 (1993), in support of his claim that the trial court was unjust it its maintenance award. In *Mathews,* this Court reversed an indefinite monthly maintenance award of $1,400, and payment of health insurance premiums of $400 when the obligor spouse, a firefighter, earned only $2800. *Mathews,* 70 Wn. App. at 123-24. *Mathews* does not hold that the trial court is obligated to consider personal debts in the calculus, nor do the facts of that case bear any resemblance to the facts here.

Thus, the trial court's decision, subject to its review of the entire record, the history of the parties, their future financial prospects, and the weight of all the evidence, is supported. Kirkendoll's argument is based

on the same deceptive income representations that the trial court rejected, is unsupported by fact or law, and is frivolous.

(4) The Trial Court Relied Upon Substantial Evidence in Calculating the Parties' Income for Child Support Purposes

In a one-paragraph afterthought, Kirkendoll also generally challenges the child support payment of $1,148.27. He does not say what the correct calculation should have been under the statutory formula. Br. of Appellant at 49. He simply says the trial court "erred" in setting child support because of Kirkendoll's claim that the $72,000 in profits he took from the business were mostly reinvested in note payments, again citing *Mull* and arguing that the payments are "capital contributions."

As a threshold matter, Kirkendoll's child support argument is frivolous because it is based on his claim, which the trial court rejected, that the profits he took from the business in 2014 were used to pay down the principal on the business note. CP 191. These representations were not credited by the trial court as explained in section C (2) and (5), *supra.*

The standards for determining gross and net income are laid out in RCW 26.19.071. In calculating net monthly income, the trial court is obliged to deduct a number of expenses such as income taxes, union dues, mandatory pension plan payments, etc., including "normal business expenses." RCW 26.19.071(5).

The trial court was within its discretion to rely on Kirkendoll's tax return in calculating his income for child support purposes. Verifying income by tax returns is the standard in Washington. RCW 26.19.071(2); *In re Marriage of Bucklin*, 70 Wn. App. 837, 840, 855 P.2d 1197 (1993).

Mull, upon which Kirkendoll relies, is inapposite. In that case, there was no controversy about the well-documented fact that the husband was required to make capital contributions to his partnership in order to continue the partnership. *Mull,* 61 Wn. App. at 721. The wife simply argued that the capital contributions should not count as "normal business expenses" under the statutory formula. This Court affirmed the trial court's conclusion that the mandatory capital contributions were normal business expenses. *Id.*[10]

Here, Kirkendoll's claims about the note payments are dubious, and the trial court's income determination was supported by substantial evidence: the tax return income he stated. He also does not explain how debt payments, an expense of his business, are the same as the "capital contributions" in *Mull.* His child support argument is frivolous and unfounded.

(5) Peterson Should Be Awarded Attorney Fees on Appeal

[10] Although the *Mull* Court noted that an income tax return is not controlling as to the issue of whether capital contributions are deductible from income for purposes of child support payments, that is a separate issue from whether the trial court was obliged to believe Kirkendoll's representations, which contradicted his tax returns.

This Court can award attorney fee on appeal if there is a basis in law or equity to do so. RAP 18.1. RCW 26.09.140 provides that a party in a dissolution action may recover his or her attorney fees on appeal. RAP 18.9 also provides that attorney fees may be awarded as sanctions for filing a frivolous appeal. Peterson should also be awarded her fees on appeal due to Kirkendoll's intransigent conduct. This basis for fees has its roots in the equitable exception to the American Rule for bad faith conduct.

If a party's conduct in a case is particularly litigious, causing the successful spouse to require additional legal services, fees and expenses will be awarded regardless of the financial resources of the prevailing party. *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989) (husband intransigent and deceptive about financial affairs); *Eide v. Eide*, 1 Wn. App. 440, 462 P.2d 562 (1969) (husband tampered with exhibits). *See also, In re Marriage of Wallace*, 111 Wn. App. 697, 45 P.3d 1131, *review denied*, 148 Wn.2d 1011 (2002) (at trial); *In re Marriage of Mattson*, 95 Wn. App. 592, 976 P.2d 157 (1999) (post-dissolution child support proceedings); *In re Marriage of Foley*, 84 Wn. App. 839, 930 P.2d 929 (1997) (pre-trial conduct).

In this case, there was no need for this appeal. Kirkendoll's exclusive purpose in pursuing it was simply to overturn the reasoned

discretionary decision of the trial court; he could not stand to "lose" to his former wife. He has forced her to needlessly expend additional fees on appeal, including to defend his hapless attempts to stay all or part of the trial court's decision. His arguments are based on misrepresentations of the record and inapposite case law, and deny reality.

In cases like *Landry*, 103 Wn.2d at 809, this Court has made clear that appellate courts should not tamper with discretionary decisions of trial courts in the disposition of marital property. This is particularly true after all parties have had the opportunity to be heard at trial. An experienced trial judge allocated the spouses' property on a basis *that favored Kirkendoll.* That should have been the end of this case. But Kirkendoll pursued this needless appeal, seeking to overturn established precedent.

This Court should not condone Kirkendoll's intransigence. It should award Peterson her fees on appeal.

D. CONCLUSION

Kirkendoll's appeal is motivated by self-interest and spite. He merely wants the opportunity to "re-do" the trial court's property division decision and force his daughter to spend time with him, rather than nurturing her choice. He also wants to avoid a just award of maintenance and child support, leaving Peterson and his child destitute. The trial court properly valued the marital assets and made a "just and equitable"

property division in accordance with RCW 26.09.080 and controlling case law in place for decades.

This Court should affirm the trial court's decree. Costs on appeal, including reasonable attorney fees, should be awarded to Peterson.

DATED this 10th day of February, 2016.

Respectfully submitted,

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Attorneys for Respondent
Kristin Peterson

APPENDIX

A

☐ EXPEDITE
☐ Hearing is set ☐ None

Date: 5/28/15
Time: 9:00 am
Judge/Calendar: Presiding

FILED

MAY 2 8 2015

Superior Court
Linda Myhre Enlow
Thurston County Clerk

Superior Court of Washington
County of Thurston
Family & Juvenile Court

In re: KAIN KLAUDE KIRKENDOLL, Petitioner, and KRISTIN ALENE KIRKENDOLL, Respondent.	**No. 14-3-00804-1** **Order on Respondent's Motion** **No Mandatory Form**

JUDGMENT SUMMARY

Judgment Creditor:	William B. Pope, POPE, HOUSER & BARNES, PLLC
Atty. for Judgment Creditor:	
Judgment Debtor:	Kain Klaude Kirkendoll
Atty. for Judgment Debtor:	Randy Finney, BROST LAW, PC
Amount of Judgment:	$-0-
Pre-Judgment Interest:	$-0-
Interest on Judgment:	n/a
Attorney's Fees:	$12,000.00
Costs:	$-0-
Interest on Atty. Fees and Costs:	Twelve percent (12%) per annum

POPE, HOUSER & BARNES
ATTORNEYS AT LAW
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OLYMPIA, WASHINGTON 98502-8325
TELEPHONE (360) 866-4000

This matter came on regularly before the Honorable Court Commissioner Jonathan Lack on the 21st day of May, 2015, pursuant to the Respondent's Motion for Order to Show Cause re Contempt, Motion for Amended Temporary Order, Order of Child Support, Amended Temporary Order re Maintenance and Restraints, Motion for the Appointment of a Receiver (Special Master), and Application for Fees. Petitioner appeared in person and with his attorney, Randy Finney of BROST LAW, PC. Respondent appeared in person and with her attorney, William B. Pope of POPE, HOUSER & BARNES, PLLC. The court having reviewed the files and records herein, and having heard the statements of counsel, and in all things being fully advised, it is now, therefore, ORDERED as follows:

1. CONTEMPT

Petitioner Kain Klaude Kirkendoll shall be and is hereby found to be in willful contempt of the court's Temporary Order entered December 9, 2014, as more specifically addressed in the Order on Show Cause re Contempt/Judgment entered this day.

2. CHILD SUPPORT

The court shall not modify the Temporary Order of Child Support. The court finds that there has not been an increase in the Petitioner's income, although he has benefitted from what the company was paid each month in addition to his $6500 monthly salary under the heading of legitimate business expenses.

3. MAINTENANCE

The court shall increase the Petitioner's maintenance obligation to the Respondent by $500 ($1500 a month total) effective with the first day of May, 2015. Whether legitimate business expenses or not, it is clear now that the Petitioner receives

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(Mileage, cell phone, health insurance)

benefits in addition to his $6500 monthly salary, and the Respondent still has a need as evidenced by declarations she filed October 21, 2014. The maintenance payment shall be made on or before the first day of each month commencing May 1, 2015. The Petitioner shall make up the delinquency (additional $500 maintenance payment for the month of May and June) by June 19, 2015. PAYMENTS due on 6th day of each month.

4. APPOINTMENT OF RECEIVER

The court shall not appoint a receiver at this time. The court, however, wants to reaffirm its earlier ruling and make it clear that the Respondent, Kristin Alene Kirkendoll, shall have full, complete, and unhampered access to all business records and all business accounts, including but not necessarily limited to, all past, current, and future business bank accounts. The Petitioner shall assure that the Respondent's name is immediately added to all past, current, and future business accounts, together with any and all other accounts where business funds may be deposited or held. Respondent shall also have full and complete access to any and all business records, including Profit & Loss statements, the books of the business, the registry of the business, checking and savings accounts, and other business bank accounts, the monthly statements for any and all bank accounts standing in the business name or any and all accounts where business funds are deposited. The Petitioner shall inform the Respondent of any and all new business transactions, accounts, or activities including, but not necessarily limited to renting out any or all of the business premises, homes, or offices to other businesses. In the event difficulties should arise and the Respondent has not received requested information and supporting documentation, then the court will and shall appoint a Receive (Special Master). Ms. Kirkendoll shall not expend funds from accounts.

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5. ATTORNEY FEES AND COSTS

From the files and records herein, it appears that the Respondent Kristin Alene Kirkendoll is the disadvantaged spouse and does not have the resources available to her that the Petitioner has enjoyed. For that reason, the Petitioner shall be required to assist Respondent with her attorney fees and costs with an award of $12,000 as set forth in the Judgment Summary above. This award is in addition to any award that may be made at a later date related to the Petitioner being found in contempt. Those fees and costs have been specifically reserved as set forth in the Order on Show Cause re Contempt. Pursuant to the Petitioner's request, the $12,000 may be paid from the funds immediately available to the Petitioner from the business. The court specifically reserves for the trial court, whether or not such funds will be considered a business expense or be reallocated to the Petitioner directly. The funds are allowed to be paid from the business account at this time so the award can be immediately satisfied. This provision, however, shall not be interpreted as an approval of this court that such a payment is a justifiable business expense.

DONE IN OPEN COURT this 28th day of May, 2015.

FILED
MAY 28 2015
Superior Court
Linda Myhre Enlow
Thurston County Clerk

JONATHON LACK
/s/
Judge/Commissioner

Presented by:

POPE, HOUSER & BARNES, PLLC

/s/
William B. Pope; WSBA #5428
Attorney for Respondent

Approved as to form and content;
Notice of presentation waived:

BROST LAW, PC

/s/
Randy Finney, WSBA # 19993
Attorney for Petitioner

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B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of:

KAIN KLAUDE KIRKENDOLL,

Appellant,

v.

KRISTIN ALENE KIRKENDOLL,

Respondent.

No. 47832-3-II

RULING DENYING MOTION TO STAY

The father requests a stay of the trial court's final orders pending his appeal. RAP 8.1(b)(3). He requests this court reinstate the temporary parenting plan, temporary order of child support, and temporary orders on maintenance and protection of community assets. This court denies the motion.

The father argues that the final parenting plan, App. G, severely restricts his time with his child. He contends that the combined monthly maintenance and child support payments exceed his monthly income. The mother responds that the final parenting plan sets a minimum guaranteed amount of contact between the father and the 14-year-old child and that in the event the child wishes to spend additional time with the father, the mother would not interfere with the request. With respect to the payments, she highlights that the parties disputed the valuation and profitability of a business the couple owned and that the trial court's orders are supported by the evidence, even if the father disagrees

with them. She adds that land and home mortgages that the father was ordered to pay are for property awarded to him. She submits documentation to support that in addition to the $6,500 monthly salary the father draws from the business, the business generates business income.

RAP 8.1(b)(3) and RAP 8.3 give appellate courts discretion to stay the enforcement of trial court decisions. RAP 8.1(b)(3) requires this court to consider (1) whether the moving party can demonstrate debatable issues, and (2) a comparison of the injury that would be suffered by the moving party in the absence of a stay with the injury to the non-moving party if a stay is issued.

This court declines to grant a stay. On appeal, this court reviews the challenged orders for abuse of discretion. *In re Custody of S.H.B.*, 118 Wn. App. 71, 78, 74 P.3d 674 (2003) ("A trial court's decision involving custody and visitation rights will not be disturbed on appeal unless the court manifestly abused its discretion."), *aff'd*, 153 Wn.2d 646 (2005); *see also In re Marriage of Vander Veen*, 62 Wn. App. 861, 867, 815 P.2d 843 (1991) (maintenance); *In re Marriage of Curran*, 26 Wn. App. 108, 110, 611 P.2d 1350 (1980) (child support). Thus, even if portions of the trial court's record support the father's argument—for example, with respect to his income and business valuation—he has a high burden on appeal to obtain reversal. Moreover, with respect to the custody determination, "[a]ppellate courts are generally reluctant to disturb a child custody disposition because of the trial court's unique opportunity to personally observe the parties." *In re Custody of Stell*, 56 Wn. App. 356, 366, 783 P.2d 615 (1989).

With respect to harm, although the child support order provides for less guaranteed visitation than the temporary order, given that the mother will not restrict additional

visitation if requested by the child, the equities do not favor staying the final custody order. With respect to the maintenance and child support payments, although the father alleges that the payments exceed his current income, he is unwilling to provide a supersedeas bond or alternate security to protect the mother in the event he does not succeed in showing that the trial court abused its discretion in dividing the assets and setting the payments. And, the mother's answer sets out financial harm she will suffer absent adequate maintenance and support. Answer at 12-15. Accordingly, it is it is hereby

ORDERED that the father's request for a stay is denied.

DATED this 11th day of August, 2015.

Aurora R. Bearse
Court Commissioner

cc: Randolph L. Finney
William B. Pope

C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of:	No. 47832-3-II
KAIN KLAUDE KIRKENDOLL, Appellant, v. KRISTIN ALENE KIRKENDOLL, Respondent.	RULING DENYING MOTION TO STAY

The facts of this pending appeal were briefly discussed in this court's August 11, 2015 ruling denying the appellant's (father) initial motion to stay the trial court's final orders pending appeal and requesting this court reinstate the temporary parenting plan, temporary order of child support, and temporary orders on maintenance and protection of community assets. They will not be repeated here.

The father files a second stay motion. He now seeks to only (1) stay his payment of a monthly maintenance obligation of $3,000 and (2) stay respondent's (mother) right to draw from a single retirement account with a balance of $150,711 (the trial court awarded all retirement assets to the mother, Mot. to Stay at 4-5). He also states that he will file a supersedeas bond in the amount of $70,000, which he calculated based on payment of the monthly maintenance amount for 18 months plus interest, plus approximately $10,000 in attorney fees. Mot. to Stay at 1-3.

The preliminary issues are whether RAP 8.1(b)(1) or RAP 8.1(b)(3) sets out the correct procedure for this modified stay request and whether this court or the trial court should hear the father's stay request. In any matter involving a money judgment, a party may enjoin enforcement of the judgment by filing a supersedeas bond or alternate security approved by the trial court. RAP 8.1(b)(1). In the event a party seeks to supersede only a portion of the judgment, the rules on appeal contemplate that the trial court must determine the appropriate bond amount. RAP 8.1(c)(3). In addition, if the decision provides for periodic payments, the trial court may either deny supersedeas or permit periodic posting of cash, bonds, or alternate security. In the event a party disputes the trial court's supersedeas decision, he or she may file a motion in this court. RAP 8.1(h). Thus, money judgment supersedeas matters generally should first be handled in the trial court.

In "[o]ther civil cases," however, RAP 8.1(b)(3), provides that the appellate court shall consider stay requests and may condition any stay on the furnishing of a supersedeas bond. (Italics omitted.) "Other civil cases" include cases involving equitable relief, but the term is not otherwise defined.[1] RAP 8.1(b)(3) (italics omitted).

It appears that periodic payments resulting from support orders qualify as money judgments. *In re Marriage of Stern*, 68 Wn. App. 922, 930, 846 P.2d 1387 (1993) (addressing trial court's modification of a child support order and noting "that RAP 8.1(b)(1) and RAP 8.1(f) provide a remedy at law for relief from the trial court judgment

[1] For example, because the father's previous stay request included changes to the parenting plan, it implicated RAP 8.3(b)(3).

during the pendency of the appeal"). Although the categorization of a retirement account withdrawal restriction is not addressed in published law interpreting RAP 8.1(b), because the father seeks to impair the mother's right to access funds in an account that the trial court awarded her, this court determines that this portion of the judgment also falls under RAP 8.1(b)(1). Moreover, even if RAP 8.3(b)(3) applied to the stay request regarding the retirement account, the father's proposed supersedeas bond does not include any amount related to this withdrawal restriction. This is a defect that this court noted in its earlier stay ruling. Ruling Denying Motion to Stay at 3 (Aug. 11, 2015) ("[H]e is unwilling to provide a supersedeas bond or alternate security to protect the mother in the event he does not succeed in showing that the trial court abused its discretion in dividing the assets and setting the payments").

Consequently, this court denies the stay request without prejudice. In the event the father wishes to supersede a portion of the judgment, he may do so in the trial court pursuant to RAP 8.1(b)(1) and RAP 8.1(c)(3). Accordingly, it is it is hereby

ORDERED that the father's request for a stay is denied without prejudice.

DATED this 29th day of September, 2015.

Aurora R. Bearse
Court Commissioner

cc: Randolph L. Finney
William B. Pope
Sidney C. Tribe

D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Marriage of: KAIN KLAUDE KIRKENDOLL, Appellant, v. KRISTIN ALENE KIRKENDOLL, Respondent.	No. 47832-3-II RULING ON RAP 8.1(h) MOTION

Kain Kirkendoll moves for review of the trial court's supersedeas decision. RAP 8.1(h). This court denies his motion in part and grants it in part.

Kirkendoll requested the superior court to stay maintenance payments to his former spouse, Kristin Peterson (fka Kristin Kirkendoll), pending appeal. RAP 8.1(c)(3). He also requested that Peterson not be allowed to access a retirement account awarded to her in connection with the dissolution. The trial court denied the motion and entered a written order.

Maintenance Payments

With respect to the maintenance payments, because RAP 8.1(c)(3), concerning the stay of a portion of a judgment or a stay involving a judgment or decision that provides

for period payments grants the superior court the discretion to grant or deny the stay, this court will review the trial court's decision for abuse of discretion. RAP 8.1(c)(3); RAP 8.1(b); RAP 8.1(h); *see also* Kenneth W. Weber, Scott J. Horenstein, Dru S. Horenstein, 21 WASH. PRAC., FAM. & COMMUNITY PROP. L. § 51.32, at paragraph 2 (Nov. 2014) (addressing child support and maintenance). "As a practical matter, the trial courts are seldom willing to stay enforcement of . . . maintenance." 21 WASH. PRAC., FAM. & COMMUNITY PROP. L. § 51.32, at paragraph 2 (citing the WASHINGTON STATE BAR ASSOCIATION, WASHINGTON FAMILY LAW DESKBOOK § 61.5 (1989)).

A trial court abuses its discretion when its decision is outside the range of acceptable choices, unsupported by the record, or reached using an incorrect legal standard. *In re Marriage of Horner,* 151 Wn.2d 884, 894, 93 P.3d 124 (2004); *In re Marriage of Littlefield,* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Upon review of the superior court's decision, this court concludes that it is not untenable.

The dissolution involved an award to Kirkendoll of the single largest asset, a business. The superior court's decision refusing to stay the maintenance payments was based on Peterson's financial declaration and budget, which showed a financial need and supported that Peterson would suffer financial hardship if the trial court stayed the maintenance payments. The trial court also noted that the maintenance amount took into account the need to compensate Peterson for her "significant investment of time and energy in the business and family home which were awarded to Mr. Kirkendoll." Motion, App. G at 6-7. Because the superior court did not abuse its discretion in refusing to stay maintenance payments, this court denies Kirkendoll's motion to modify. RAP 8.1(h).

Retirement Account

With respect to Kirkendoll's request to prevent Peterson from accessing a retirement account during the pendency of the appeal,[1] although a trial court's order dividing property (both real and personal) may be stayed as of right pursuant to RAP 8.1(b)(2) by application to the trial court and the posting of sufficient bond,[2] 21 WASH. PRAC., FAM. & COMMUNITY PROP. L. § 51.32, at paragraph 3 (Nov. 2014) (addressing property division), because Kirkendoll only seeks to stay a portion of the property division order, this request also falls within RAP 8.1(c)(3).

Nevertheless, reading the part of RAP 8.1(c)(3) addressing a request to stay a portion of a judgment in conjunction with RAP 8.1(b)(2), setting out a right to a stay of a decision affecting property, the two provisions support that a stay of this portion of the judgment is available to Kirkendoll as of right upon the posting of sufficient bond. The superior court, however, denied the stay request related to the retirement account, stating "There is no evidence submitted to support, much less compel the court to stay the award of the retirement account." Motion, App. G at 5. Consequently, this court modifies the superior court's supersedeas decision to grant Kirkendoll's request to prevent Peterson

[1] For the purpose of this analysis, this court treats the motion as a request to stay awarding the retirement account to Peterson. Peterson would not be permitted to access funds in an account that is not hers.

[2] To the extent this court's previous ruling instructing Kirkendoll to pursue a stay request in the superior court indicated that the retirement account stay request falls under RAP 8.1(b)(1), it likely misstated the correct provision in light of the procedures described in Washington Practice. Because RAP 8.1(b)(1) and RAP 8.1(b)(2) both grant a moving party a stay as of right upon application to the trial court, the actual subsection is immaterial to the present analysis.

from accessing the funds in the retirement account during the appeal. The matter is remanded to the trial court to set the supersedeas amount. RAP 8.1(c)(3).

Peterson requests sanctions related to Kirkendoll's stay requests. Her request is denied without prejudice and may be raised as part of any attorney fee request submitted in connection with the merits of the appeal. Accordingly, it is it is hereby

ORDERED that the motion to modify pursuant to RAP 8.1(h) is denied in part and granted in part.

DATED this 2nd day of December, 2015.

Aurora R. Bearse
Court Commissioner

cc: Randolph Lee Finney
William B. Pope
Sidney C. Tribe
Hon. Christopher Wickham

DECLARATION OF SERVICE

On said day below, I e-filed a true and accurate copy of the Brief of Respondent in Court of Appeals, Division II, Case No. 47832-3-II, to the following parties:

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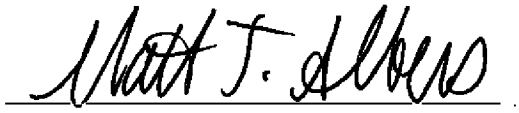
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 10, 2016, at Seattle, Washington.



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February 10, 2016 - 1:18 PM

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